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No. 1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CURTIS, INC., and MONFORT PACKING CO.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC., and RINGSBY TRUCK LINES, INC.
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 1(e) of the Revised Rules of this Court, the Appellees Denver-Albuquerque Motor Transport, Inc., and Ringsby Truck Lines, Inc., respectfully move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a Three-Judge District Court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed an action brought by the Appellant Curtis, Inc., seeking to set aside and enjoin the enforcement of certain orders of the Interstate Commerce Commission entered by that agency in a proceeding entitled *"Curtis, Inc., Extension—Greeley, Colo., No. MC-113678 (Sub-No. 7)".*[1]

[1] The opinion of the District Court is reported at 225 F. Supp. 894, and has been reproduced in Appendix A of the *Jurisdictional Statement*. The decisions of the Commission are not officially published, but the reports thereof have been reproduced in Appendices B through E, inclusive, of the *Jurisdictional Statement*.

Because of the procedural question urged by the Appellants before this Court, a brief resume of the disposition of the matter before the Commission is warranted at this point.

The proceedings before the Commission had their genesis in an application filed June 26, 1959 by Appellant Curtis, Inc., pursuant to Section 207 of the Interstate Commerce Act,[2] seeking a certificate of public convenience and necessity to authorize the transportation of meats and related commodities, as a common carrier in interstate commerce, over irregular routes, from Greeley, Colorado, to *all points* in 37 states and the District of Columbia. A public hearing on the application was held at Denver, Colorado, on September 24, 1959, before an Examiner of the Commission. In addition to a description of the proposed transportation by Curtis, testimony in support of the application was furnished by Capitol Packing Company,[3] an operator of a slaughterhouse and meat packing plant at Greeley, Colorado. Appearing in opposition to the application were 11 certificated motor carriers, including Appellees Denver-Albuquerque and Ringsby, together with numerous railroads, all of which introduced evidence calculated to establish the adequacy of existing transportation services.

By a Report and Recommended Order served January 25, 1960, the Examiner recommended that the application be granted, in substantial part, including area-wide destinations in 13 states and the District of Columbia and numerous specified destinations in the other 24 states embraced within the application.[4] Curtis filed no exceptions concerning the partial denial of the application. Exceptions to the authority recommended were filed, however, by a number of the opposing carriers, including Appellee Denver-Albuquerque.

On February 16, 1961, the Commission, acting by Division 1,[5] issued its Report and Order in which, differing

[2] 49 U.S.C. 307.

[3] The predecessor in interest of Appellant Monfort Packing Company.

[4] *Jurisdictional Statement*, Appendix B, p. 50.

[5] Consisting of Commissioners Murphy, Webb, and Herring, with Webb dissenting (*Jurisdictional Statement*, Appendix C).

with the recommendations of the Examiner, it granted the application only to the extent of authorizing the proposed operations from Greeley to 7 specified destination cities.[6] The application in all other respects was denied. Curtis filed a petition for reconsideration, to which replies were filed on behalf of several protestants, including Appellees Denver-Albuquerque and Ringsby.

On August 22, 1961, the Commission, acting by Division 1,[7] issued its Report and Order on Reconsideration, vacating the prior order of February 16, 1961 and granting the application to the same extent originally recommended by the Examiner. Petitions for reconsideration were filed this time by a number of the protesting carriers, including Appellees Denver-Albuquerque and Ringsby.

By a Decision and Order issued May 14, 1962, the Commission, acting in General Session,[8] vacated the prior report of Division 1 on reconsideration and reinstated the original February 16, 1961 report of Division 1.[9] A certificate was accordingly granted to Curtis, subject to compliance with applicable sections of the Act, to the same limited extent as had been previously granted by Division 1 in its original report and order.[10] The Appellants contend in their "Statement of the Case" that this last decision and order by the Commission was entered "without making any findings of fact or conclusions of law."[11] Such a reading of the Commission's decision and order is untenable, and ignores the plain wording and effect of the following provision:

> "*On reconsideration we find*, That the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that

[6] New Haven, Conn., Savannah, Ga., Lexington, Ky., Boston, Mass., New York, N. Y., Knoxville, Tenn., and Washington, D. C. (*Jurisdictional Statement*, Appendix C, p. 65).

[7] Consisting of Commissioners Walrath, Webb and Tucker, with Walrath dissenting. The opinion was written by Commissioner Webb, who had dissented from the original report. The composition of Division 1 had changed since the original report, and Commissioner Webb was the only Commissioner participating in both of the reports by Division 1 (*Jurisdictional Statement*, Appendix D).

[8] Consisting of the entire membership of 11 Commissioners, with Commissioners Webb and Tucker dissenting (*Jurisdictional Statement*, Appendix E, p. 76).

[9] *Ibid*, pp. 76-78.

[10] *Ibid*, pp. 77-78; tootnote 6, *supra*.

[11] *Ibid*, p. 7.

reached by the Commission, division 1, in its report and order of February 16, 1961, and that the statement of facts, the conclusions, and the findings therein as set forth in the appendix hereto, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own."[12]

A final petition for reconsideration by Curtis was denied by the Commission on November 2, 1962, and the action on review before the District Court ensued. Appellant Monfort Packing Co. intervened before the District Court in support of the complaint, and Appellees Denver-Albuquerque and Ringsby intervened as defendants in support of the Commission's decision and order. The District Court received briefs and heard oral arguments on behalf of all the parties, and by an opinion filed January 28, 1964, unanimously upheld the decision and order of the Commission and dismissed the complaint.

The Appellants' *Jurisdictional Statement*, on appeal to this Court, was received by the Appellees Denver-Albuquerque and Ringsby on April 20, 1964. Accordingly pursuant to Rule 16 of the Revised Rules of this Court, it is deemed that the due date for filing the instant motion to affirm is on or before May 20, 1964.

ARGUMENT

This case involves no question of novel or general significance. Both of the questions stated by the Appellants have been thoroughly briefed, argued, considered, and resolved before the District Court, and that Court's unanimous holdings thereon are fully in harmony with prior decisions and principles announced by this Court. To demonstrate the lack of substance in the pair of questions brought by this appeal will require only brief exposition, presented according to the design of the *Jurisdictional Statement*.

[12] *Ibid*, Appendix E, p. 77. The Appellants themselves necessarily recognize that the Commission in its decision and order of May 14, 1962 "adopted" the findings of the prior Division 1 report of February 16, 1961, and that, therefore, the "Commission's ultimate decision in this matter must stand or fall on the correctness of this earlier order." (*Ibid*, p. 9).

Question 1 Is Unsubstantial

The brunt of Appellants' argument in support of the first question stated by them goes to the substantiality of evidence upon which the Commission acted. Thus, it is argued that the Commission acted arbitrarily and unreasonably because, it is said, "the availability of any type of service from existing carriers, was entirely speculative", that the availability of such service was in part "based upon allegedly available interline arrangements", that such service "may be entirely unavailable or completely unsuitable", and so forth to the same effect.[13]

The purpose of such an argument is at odds with fundamental principles governing review by this Court. It is now beyond argument that in cases such as this the Court will not concern itself with the weight of evidence upon which the Commission acted, nor with the correctness of the Commission's reasoning and conclusions, nor with the wisdom or expediency of the order, nor whether, on like evidence, the Court would have made a similar assessment.[14] "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."[15]

The Appellants' argument, as phrased under the first question, attacks the factual validity of the Commission's findings to the effect that "shipper has an adequate motor carrier service available from Greeley" to all but 7 of the destinations required.[16] Basic to a sure understanding of that determination is the theory of the very evidence which was offered in support of the application. At the time of the hearing, the shipper was constructing a new plant at Greeley. A similar plant had been operated for a number of years by the shipper at Denver, approximately 55 miles away. The shipper evidence in support of a future need for transportation from the Greeley plant proceeded on the expressed notion that the operations of that plant, in-

[13] *Jurisdictional Statement*, pp. 10, 11, 15.

[14] *United States v. Carolina Freight Carriers Corporation*, 315 U.S. 475, 482-484; *Virginian Railway Company v. United States*, 272 U.S. 658, 665-666; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U.S. 541, 547.

[15] *Mississippi Valley Barge Line v. United States*, 292 U.S. 282, 286-287.

[16] *Jurisdictional Statement*, Appendix C, p. 63.

cluding how it would "handle the traffic" from there, would be "exactly as we operate the Denver Plant" (Transcript, 36-37). In support of this, as the Commission's report of February 16, 1961 reflects in some detail, the shipper introduced into evidence a list of 147 points in the involved territory to which it was apparently making satisfactory shipments from Denver, together with 4 additional destinations to which it allegedly had been unable to obtain service.[17] As the Commission correctly stated, "Shipper asserts that it will ship to all these destinations from the Greeley plant and to additional points, although none were specified."[18]

It is altogether clear from the evidence of record that both Curtis and its supporting shipper based their case before the Commission upon the premise that the extent of prospective need for service from Greeley, and the involved estimate of the adequacy of existing service from that point, could and should be foretold on the basis of the shipper's experience with existing carriers from Denver. Such being the gist of the evidence presented, the Commission's conclusion that the shipper would have adequate service from Greeley, except to 7 of the specifically involved destinations, flowed rationally from findings that the shipper had been able "to move its products satisfactorily from Denver" to the remaining specified destinations via existing carriers other than Curtis; that those existing carriers which operated from Denver but could not serve the Greeley origin directly "are willing to interchange vehicles with those carriers operating between Denver and Greeley", and that "this service has not been tried by shipper and there is no substantial basis for finding this type of service is inadequate or unsatisfactory."[19]

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[17] In identifying that exhibit, the shipper witness, referring to the 4 destinations of New Haven, Savannah, Lexington, and Knoxville, explained:

"We have requested service to these points and have not been able to handle them presently. These are the points that we would like to have the service available that we are not servicing now" (Transcript 40-41; Exhibit 4). The certificate ultimately issued by the Commission in this proceeding authorized service to the 4 named destinations, plus 3 other destinations which Curtis was already authorized to serve from Denver. The remaining 144 destinations referred to by the shipper were admittedly being served by other existing carriers.

[18] *Jurisdictional Statement*, Appendix C, p. 60.

[19] *Ibid*, Appendix C, p. 63.

Appellants themselves acknowledge that their first question in this appeal requires a redetermination of "whether the record provided any reasonable basis for the above stated findings."[20] The true posture of this aspect of their appeal is therefore seen as an attempt to relitigate essentially factual issues which are committed by statute to the jurisdiction of the Commission.[21]

On applications such as this "forecasts as to the future are necessary to the decision."[22] The District Court so recognized and held that the necessary prediction "could be rationally made upon the evidence before the Commission", and that it, therefore, "must follow that the Commission's finding that the shipper '. . . has an adequate service available from Greeley to those points to which it now ships from Denver' is supported by substantial evidence."[23] This is manifestly so upon the basis of the record considered in its entirety, and Appellants' appeal on this question should accordingly be halted at the threshold.[24]

Even if the Court should choose to inquire into the merits of the conclusion reached by the Commission concerning the adequacy of existing service, the arguments advanced by the Appellants are not well taken. The Appellants' key line of attack is ultimately directed against the "availability of any type of service from existing carriers" at Greeley, particularly through interline connections at Denver,[25] and the supposed failure of the protesting carriers to allege or affirmatively prove "that they were able to provide service to the entire destination area through these interline arrangements."[26]

As to the availability of interline connections between Greeley and Denver, the Appellants would have it appear that all of the opposing carriers would depend upon such

[20] *Ibid.* p. 9.

[21] *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-536.

[22] *United States v. Detroit, etc. Navigation Co.*, 326 U.S. 236, 241.

[23] *Jurisdictional Statement*, Appendix A, pp. 36-37.

[24] Cases cited at footnotes 14, 15, 21, *supra*.

[25] The concepts of "interlining", and "interchanging", and their commonplace occurrence in the regulated operations of motor carriers, were recognized by this Court in *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115, 122 (note 2).

[26] *Jurisdictional Statement*, pp. 10-16.

connections to render destination service. Such is not the case. Among the protestant carriers, for example, Ringsby Truck Lines, Inc., Buckingham Transportation, Inc., Pacific Intermountain Express Co., and Watson Brothers Transportation Co., all are authorized to operate from the Greeley origin directly and to provide single-line service to a great number of the involved destinations; through interchange, these carriers are authorized to initiate shipments from Greeley which would span the continental scope of the application.[27]

With respect to the other protesting carriers whose operations covered the remaining destinations specified by the shipper, but which were not authorized to initiate traffic at Greeley, affirmative proof was made of interline connections from Greeley to Denver. Bethke Truck Lines and Centennial Truck Lines, two certificated short-line carriers operating between Greeley and Denver, both introduced evidence establishing their willingness and ability to originate the involved traffic at Greeley and interline or exchange such traffic with the other carriers operating from Denver.[28] The supporting shipper testified that there was no known reason why such interline connections could not be used by it.[29]

To contend, as the Appellants do, that it was necessary for the opposing carriers to allege and affirmatively show how they would provide service "to the entire destination area", is to cavil. Although Curtis sought authority to transport the involved traffic to *all* points in 37 states and the District of Columbia, it is fundamental that the burden of proof is upon the applicant to show precisely what service is required by public convenience and necessity, and that burden involves an affirmative showing not only of what extent of service is necessary but also that existing facilities are inadequate to such extent.[30]

As seen, the evidence offered in support of the applica-

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[27] Transcript 135-139, 149, 152, 164-166, 170-176, 213-215; Exhibits 9-12, 14-15, 23-27.

[28] Transcript 112-113, 159.

[29] Transcript 69, 80-81.

[30] *Hudson Transit Lines, Inc. v. United States* (D.C., N.Y., 1948) 82 F. Supp. 153, Aff'd *per curiam* 338 U.S. 802.

tion positively limited the showing of the extent of service required to 151 specified points. The evidence of the opposing carriers was primarily designed to establish the adequacy of existing service to those destinations actually put in issue by the applicant, and could not reasonably have been expected to negative a need for service to all other conceivable destinations in the extensive, virtually nationwide territorial ambit of the application as filed. The evidence adduced in support of the application also, as previously pointed out, acknowledged that service was available from existing carriers other than the applicant to all but 7 of the considered destinations. As the Commission properly concluded, there was no proof of material inadequacy in existing service to the remaining 144 destinations shown to be involved. Significantly, Curtis does not now allege that the Commission's findings concerning adequacy of existing service to any one of the specific destinations involved are without substantial support in the record. The *reductio ad absurdum* of the argument which is made concerning an alleged lack of evidence of existing service to all points in the "entire destination area" of 37 states is manifest, and the entire point begs the real question of public convenience and necessity based upon the limited extent of service shown by the evidence to be required.

Appellants attempt to make such of the circumstance that a particular destination area carrier, with whom one of the protesting carriers might interline traffic for ultimate delivery, did not appear at the hearing.[31] In the same vein, the Appellants urge that this Court should hold that the failure of certain carriers to follow through in their opposition after the hearing by filing exceptions should be regarded as a lack of continued interest in the proceeding.[32] Both of these arguments are wide of the mark, and imply a fundamental misconception of the nature of proceedings before the Commission. It is "public" convenience and necessity, not the conflicting, private interests of competing carriers, which occupies the arena before the Commission. The Commission, with repeated judicial approval, has consistently held that the statute requires an affirmative showing

[31] *Jurisdictional Statement*, 12-13.
[32] *Ibid*, 9-10.

by the applicant that the proposed service is or will be required by present or future public convenience and necessity,[33] and no such showing may be presumed from the failure of existing motor carriers, let alone all possible connecting carriers, to oppose the application.[34]

Entirely aside from the statutory policy requiring competent proof of public convenience and necessity even in the absence of any protests by existing carriers, the District Court laid bare the logical deficiency of the Appellants' claim that the failure of some carriers to file exceptions to the authority initially recommended indicated a lack of continuing interest, as being an "inference drawn from a fact susceptible to other inferences", and a theory which "would place a burden of practically interminable litigation upon every existing [carrier] which decided to protest an application." [35]

The Appellants' reliance on the Commission decisions cited at pages 9 and 10 of the *Jurisdictional Statement* is misplaced. To be sure, such decisions may stand for the proposition that in certain circumstances the Commission has regarded a failure of an existing carrier to except to a recommended grant of authority as tending to indicate that such carrier may "not be adversely affected by the requested authority." [36] But that is an entirely different matter from saying that such lack of participation may be used by an applicant to fill a gap in its own case of establishing proof that there is a public need for the proposed operation that cannot adequately be met by existing carriers. In each of the decisions relied upon by the Appellants, a reading will disclose that there was independent proof by the applicant showing public convenience and necessity. None of such cases is in conflict in any way with the en-

[33] *Hudson Transit Lines, Inc. v. United States* (D.C., N.Y., 1948) 82 F. Supp. 153, 157, Aff'd. *per curiam* 338 U.S. 802; *Quickie Transport Co. v. United States* (D.C., Minn., 1959) 169 F. Supp. 826, Aff'd. *per curiam* 361 U.S. 36.

[34] See, for example: *Motor Vanway*, 17 M.C.C. 314, 316; *Thomas Boyd*, 20 M.C.C. 533, 534; *Burlington Transportation Company* 43 M.C.C. 729, 736, Aff'd. *Burlington Transportation Company v. United States* (D.C., N.D., Ill., May 9, 1946, not officially reported) 5 Fed. Carriers Cases Para. 81, 320; *Carl Subler Trucking, Inc.*, 77 M.C.C. 395, 398; *Robbins Motor Transportation v. United States* (D.C., Pa., 1962) 204 F. Supp. 78, 82; *Colorado-Arizona-California Express, Inc. v. United States* (D.C., Colo., 1963) 224 F. Supp. 894, 899-900.

[35] *Jurisdictional Statement*, Appendix A, p. 34.

[36] *Ibid*, p. 10.

trenched principle, properly applied here, that the applicant's burden of proof cannot be overcome simply by showing that all possible existing carriers may not have testified, or by reference to the circumstance that one or more protestants may have abstained from filing exceptions or replies after the hearing.[37]

The Commission decisions relied upon by Appellants in support of their claim that service available through interline arrangements must be proven are similarly inapposite. The short answer is that evidence concerning the requisite interline arrangements was introduced. As previously shown, evidence concerning the interline bridge between Greeley and Denver was furnished by the two short-line carriers which would actually make that connection. With respect to interline connections in the destination territory, the carriers which would perform the initial or intermediate transportation fully identified the delivering carriers which would be involved, described the operating authority held by such carriers, and explained, chiefly by reference to documentary exhibits introduced into evidence, how and to what points the interline service would be provided. Appellants now conveniently overlook the fact that they offered no objection to the receipt in evidence of either the testimony or exhibits pertaining to interline arrangements.[38]

Appellants also conveniently overlook the fact that their own evidence served to confirm that existing service was available from Denver, either direct or through interline, to all but 4 of the involved destinations. Neither at the hearing, nor now, have the Appellants pointed to a single, specific destination to which a need for service has been established which is not available from one or more existing

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[37] Cases cited at note 34, *supra*. Also in point is the recent decision by this Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, which invalidated the issuance of common carrier operating rights granted by reference to the disinclination of existing carriers to provide service rather than "within the bounds of the standard of 'public convenience and necessity'."

[38] See, for example, the introduction of evidence by Kroblin Refrigerated Express concerning its interline service with Indiana Refrigerator Transport, which evidence is now disputed at pages 12 and 13 of the *Jurisdictional Statement* (Transcript 185-187; Exhibit 29).

carriers.[39] That was, and is, the fatal flaw of their case before the Commission, and cannot be cured on review by attempts to shift the burden of proof or sift the weight of evidence.

Question 2 Is Unsubstantial

Appellants' argument on the prior question tends to get in the way of their argument here. Under the first question, it is apparent that they had no difficulty in recognizing that "the reasoning underlying the Commission's denial of substantially all of Appellants' application was expressed in the Division 1 Order of February 16, 1961".[40] This obviously, because it was recognized that the decision and order by the entire Commission, entered May 14, 1962, "adopted this earlier finding without qualification or amplification."[41] Proceeding to their second question raised on appeal, however, the Appellants assert that the Commission's decision and order of May 14, 1962, which denied substantially all of the application, contravenes Section 8(b) of the Administrative Procedure Act[42] "by failing to include a statement of findings and conclusions, as well as the reasons therefor."[43]

The point is, that in the first instance the Appellants have recognized and addressed their arguments to, "findings" within the orthodox sense of the Administrative Procedure Act, while in the present instance, the Appellants complain about a lack of "findings" in the sense of subjective mental processes of the Commissioners participating.

In the relevant portion of the Commission's final decision and order, which is incompletely quoted by Appellants at page 16 of the *Jurisdictional Statement*, a majority of 9 of the 11 Commissioners, "affirmed and adopted as our

[39] The circumstance that direct, single-line service may not be available from Greeley to each of the involved destinations is not in itself critical. "The national transportation policy does not tolerate the thought that all shippers at all points are entitled to single-line motor carrier service." *Hancock Trucking, Inc.*, 62 M.C.C. 513, 535; accord: *Consolidated Freightways*, 83 M.C.C. 421; *Ayer v. United States* (D.C., Ga., 1956) 139 F. Supp. 440, 443-444; *Colorado-Arizona-California Express, Inc. v. United States* (D.C., Colo., 1963) 224 F. Supp. 894, 898.

[40] *Jurisdictional Statement*, p. 8.

[41] *Ibid.* p. 8-9.

[42] 5 U.S.C. 1007(b).

[43] *Jurisdictional Statement*, p. 16.

own", the "statement of facts, the conclusions, and the findings" set forth in the earlier report and order by the Commission, Division 1, on February 16, 1961.[44] The Commission recites that such action was taken because, "*On reconsideration we find*, That the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that reached" in the February 16th report and order.[45] After adopting that report and order, the Commission accordingly "vacated and set aside" the August 22, 1961 intermediate report and order on reconsideration.[46]

As "affirmed and adopted" by the entire Commission, the statement of facts, the conclusions, and the findings contained in the February 1961 report stand exactly as if they had been reiterated verbatim in the final decision and order. The Appellants stop short of suggesting that the Commission has thereby failed to furnish *objective* "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record". The Administrative Procedure Act requires no more. The Congressional purpose of that Act was not to exact a form of literary exercise from administrative agencies, but to insist on sufficient disclosure of the basis of an order.[47]

If the final decision and order of the Commission and the "adopted and affirmed" February 16, 1961 report and order are read together, as was clearly intended by the Commission, both the parties and this Court are furnished a concrete basis for understanding the reasoning of the administrative adjudication. This should end inquiry concern-

[44] *Jurisdictional Statement*, Appendix E, p. 77.

[45] *Ibid*, p. 77.

[46] *Ibid*, p. 77.

[47] In *T.S.C. Motor Freight Lines, Inc. v. United States* (D.C., Tex., 1960) 186 F. Supp. 777, 787, Aff'd. *sub nom Herrin Transp. Co. v. U. S.*, 366 U.S. 419, it was said, in circumstances parallel with the instant case:

"The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the 'findings of the Commission [are] in accordance with the evidence and applicable law' is obviously a statement that the Commission is standing behind its original detailed and articulate findings and conclusions. The law requires no more."

ing the sufficiency of "findings" within the conventional meaning of the Administrative Procedure Act.

The fact that the Commission finally "adopted and affirmed" the findings of the February 1961 report and order, by reference, rather than slavishly repeating or paraphrasing them, is certainly not grounds for valid objection. The use by the Commission of such short-form decisions and orders, adopting and affirming a prior report or recommended report, has been sanctioned in a number of decisions on review.[48] There is nothing inconsistent therewith in any of the three District Court opinions cited by Appellants,[49] and none of those cases is remotely equivalent to the instant matter. The crucial distinction between the cases which Appellants rely upon, and the present case, is that, as the District Court below pointed out, "in none of these cases in which the courts reversed summary vacations of prior orders, did the vacating orders have a prior reasoned opinion to fall back upon and to adopt as its own."[50] In no instance, did the final orders in the cases cited by Appellants *contain or incorporate* any findings whatever. They are therefore profoundly different from this case.

The Appellants tend to concede that a short-form decision incorporating a prior report, such as used here, may be an "entirely satisfactory and permissible method" in the ordinary case, but contend that it is defective here in view of the prior "conflicting decisions rendered by Division 1". The short answer to this is that the Court is not concerned with the consistency or inconsistency of Commission decisions. *Virginian Railway Co. v. United States*, 272 U.S. 658. As the District Court properly concluded, "review can extend only to the Commission's final, definitive report and order of May 14, 1962, and not to the preliminary stages or

[48] *T.S.C. Motor Freight Lines, Inc. v. United States* (D.C., Tex., 1960) 186 F. Supp. 777, Aff'd *sub nom Herrin Transportation Co. v. United States*, 366 U.S. 419; *City of Philadelphia v. United States* (D.C., Pa., 1961) 197 F. Supp. 832; *Yale Transport Corp. v. United States* (D.C., N.Y., 1962) 210 F. Supp. 862; *North American Van Lines, Inc. v. United States* (D.C., Ind., 1963) 217 F. Supp. 837.

[49] *Amarillo-Borger Express v. United States* (N.D., Tex., 1956), 138 F. Supp. 441, judgment vacated as moot, 352 U.S. 1028; *Long Island R. Co. v. United States* (D.C., N.Y., 1956) 140 F. Supp. 823; *Dixie Carriers, Inc. v. United States* (D.C., Tex., 1956) 143 F. Supp. 844 (*Jurisdictional Statement*, p. 20).

[50] *Jurisdictional Statement*, Appendix A, p. 38-39.

preparatory steps. *Long Transportation Corp. v. United States* (S.D., Calif., 1948) 75 F. Supp. 915." [51]

In the last analysis, boiled down to its essence, the Appellants' argument concerning "findings" is that the Commission's final decision and order is unlawful because it does not recite what mental processes or subjective reasoning on the part of the Commissioners culminated in the adoption of the February 1961 report rather than the August 1961 report. Such psychoanalysis of the administrative process was never contemplated by the Administrative Procedure Act, nor has it ever been a legitimate object of judicial review. The Commission, of course, has statutory authority to "reconsider" prior action, and to reverse, change, or modify its prior decision.[52] Where, as here, the ultimate decision and order on reconsideration adopts a prior reasoned report which sets out a sufficient basis for the action taken, "there is no requirement that the Commission specify the weight given to each item of evidence or fact or disclose mental operations by which its decisions are reached." [53]

[51] *Jurisdictional Statement*, Appendix A, p. 39.

[52] 49 U.S.C. 1, (6) and (7).

[53] *Baltimore & O. R. Co. v. United States* 298 U.S. 349, 359; *Morgan v. United States* 304 U.S. 1, 18; *Morgan v. United States*, 313 U.S. 409, 422; *Chicago, Burlington & Quincy R. Co. v. Babcock* 204 U.S. 585, 593.

CONCLUSION

PREMISES CONSIDERED, the Appellees Denver-Albuquerque Motor Transport, Inc. and Ringsby Truck Lines, Inc. respectfully submit that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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